UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BRIAN CARBONARO,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 96-326-P-C***
	)	
LOVE'S FISHERIES, INC.,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

In this admiralty case, the plaintiff seeks to recover damages in connection with an accident that took place in 1996 aboard the F/V Katahdin while the plaintiff was in the employ of the defendant, the vessel's owner. The plaintiff seeks to recover for negligence under the Jones Act, 46 U.S.C. app. § 688, and also asserts claims for unseaworthiness as well as maintenance and cure. The defendant moves for summary judgment on the unseaworthiness and Jones Act claims.[1] The plaintiff has filed a cross-motion for summary judgment on the defendant's assertion of contributory negligence as an affirmative defense. For the reasons that follow, I recommend that the defendant's motion be granted as to the unseaworthiness claim, and that both motions be otherwise denied.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

[1] Although the defendant's motion could also be read to cover the claim for maintenance and cure, it does not discuss this claim in its memorandum of law and I therefore deem it not included in the motion.

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc*., 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give the party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Assn. of Machinists & Aerospace Workers v. Winship Green Nursing Ctr*., 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).[2]

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[2] Local Rule 56 requires that a party making or opposing a summary judgment motion present a "separate, short and concise statement of material facts." Loc.R. 56. To meet this requirement, the parties have incorporated into their respective legal memoranda separate sections that are denominated as a statement of fact followed by sections reciting facts each party contends are not in dispute. The defendant then goes on to list what it describes as "refuted and factually unsupported allegations." Defendant's Memorandum of Law in Support of Its Motion for Summary Judgment ("Defendant's Memorandum") (Docket No. 7) at 4. The legal analyses in the parties' memoranda are also liberally seasoned with factual assertions that the parties ask the court to credit. (continued...)

II. Factual Context

Viewed in the light most favorable to the plaintiff, the record reveals the following: On April 18, 1996 the plaintiff was employed as a deckhand aboard the F/V Katahdin, owned and operated by the defendant. Defendant's Memorandum at 4; Plaintiff's Memorandum in Support of Plaintiff's Opposition, etc. ("Plaintiff's Memorandum") (Docket No. 10) at 2. Also so employed on that date was Michael Patterson. Defendant's Memorandum at 1-2; Plaintiff's Memorandum at 2. The plaintiff was injured while standing at a table dressing monkfish. Defendant's Memorandum at 1; Plaintiff's Memorandum at 1. The plaintiff was standing on the starboard side of the vessel, facing aft, when Patterson walked forward to get a deck hose. Deposition of Brian Carbonaro ("Carbonaro Dep."), Exh. A to Plaintiff's Memorandum, at 182, 193. While attempting to pass behind the plaintiff Patterson bumped into the plaintiff's right arm and the plaintiff, who was holding a knife in his right hand and a fish in his left hand, cut his left hand with the knife. *Id*. at 197-99. Patterson did not warn the plaintiff prior to attempting to pass behind him. *Id*. at 205.

A "monk hook" is a device that a crew member may use to hold the monkfish on the cutting table as it is being dressed. *Id.* at 234. Although the majority of vessels that process monkfish are equipped with these devices, not all such vessels are so equipped. *Id*. at 233-34. At the time of the accident giving rise to this litigation, the Katahdin was not equipped with monk hooks. 30(b)(6)

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[2](...continued)
This is not a complicated case and I am therefore able to ascertain without difficulty precisely where the disputed factual issues lie. However, as a general proposition, parties to a summary judgment motion are well-advised to make absolutely clear to the court precisely which factual assertions comprise their Local Rule 56 factual statements, inasmuch as a party may not challenge a summary judgment decision based on facts not properly presented via the method prescribed by the Local Rules. *See Pew v. Scopino,* 161 F.R.D. 1 (D.Me. 1995).

Deposition of Love's Fisheries, Inc. and Terry L. Hopkins individually, Exh. B to Plaintiff's Memorandum, at 51.

III. Unseaworthiness

The defendant contends it is entitled to summary judgment on the unseaworthiness claim because the mere happening of a maritime accident, without some evidence that it was caused by a defective condition of the vessel, cannot sustain such a cause of action. The plaintiff responds that the requisite defective condition is present, in the form of the Katahdin's failure to provide monk hooks for crew members to use to hold the monkfish while dressing them. I agree with the defendant that this alleged deficiency is not enough to sustain a claim for unseaworthiness. Relief must be premised on violation of the shipowner's "absolute duty to provide to every member of his crew a vessel and appurtenances reasonably fit for their intended use." *Ferrara v. A. & V. Fishing, Inc.*, 99 F.3d 449, 453 (1st Cir. 1996) (citations and internal quotation marks omitted). Shipowners are not expected to provide vessels that are perfect, or that will protect crew members from every possible peril, but only ones that are reasonably suited for their intended service. *Id*. Therefore, the mere possibility that alternative work procedures, or alternative equipment, could have been used by the vessel is not enough to support an unseaworthiness claim absent some evidence from which a reasonable factfinder could determine that the equipment or method actually used were themselves unsafe. *Phillips v. Western Co. of N. Am.*, 953 F.2d 923, 928 (5th Cir. 1992). In that regard, it is the plaintiff's contention that, had he been using a monk hook instead of his hand to hold the fish he was dressing at the time of the accident, "his hand would not have been in the zone of danger" and the knife would have struck the hook instead of the plaintiff's hand. Plaintiff's Memorandum at 4-5,

citing Carbonaro Dep. at 211-13. While "[t]he requisite causation to sustain an unseaworthiness claim . . . is less than that required for a common law negligence action," the plaintiff must still produce at least "some evidence that the unseaworthy condition" was "a direct and substantial cause" of the injury. *Hubbard v. Faros Fisheries, Inc*., 626 F.2d 196, 201 (1st Cir. 1980). In place of such evidence, the plaintiff offers only his speculation that the accident would have been avoided had his hand been a few inches away from where it was, and that the use of a monk hook would have made it so. This is too attenuated a causal link to sustain an unseaworthiness claim.

IV. Jones Act

The Jones Act permits a seaman to maintain a cause of action for maritime negligence when suffering personal injury in the course of his employment. 46 U.S.C. app. § 688(a). In his opposition to the defendant's summary judgment motion, the plaintiff makes clear that his Jones Act claim proceeds on the theory of *respondeat superior* in connection with the alleged negligence of his fellow crew member Patterson. The defendant does not dispute that *respondeat superior* may be properly applied to a Jones Act claim, but rather relies on the First Circuit's observation in *Logan v. Empresa Lineas Maritimas Argentinas*, 353 F.2d 373 (1st Cir. 1965), that "[t]he mere happening of an accident does not in itself establish unseaworthiness." *Id*. at 377. As has already been discussed, an unseaworthiness claim requires proof beyond the elements of a traditional negligence cause of action. *See Ferrara*, 99 F.3d at 453 (unseaworthiness and Jones Act negligence are "causes of action distinct from each other"). *Logan* is therefore inapposite. Moreover, to the extent that Jones Act negligence differs from ordinary common-law negligence, it is that the former is significantly easier for a plaintiff to prove. *See id.* (plaintiff's burden of showing causation in Jones

Act case a "featherweight") (citation omitted). In my opinion, the present record could permit a factfinder to conclude that Patterson, and through him the defendant, breached a duty of care owed to the plaintiff and thus caused injury to him. Summary judgment on the Jones Act claim is therefore inappropriate.

V. Contributory Negligence

The defendant has asserted contributory negligence as an affirmative defense to the plaintiff's claims. In an admiralty case, a plaintiff's contributory negligence is not a complete defense to the plaintiff's claims but may be considered "in mitigation of damages as justice requires." *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953). Since the plaintiff has moved for summary judgment on the issue of contributory negligence, the court must view the applicable portions of the record in the light most favorable to the defendant. As the defendant points out, there is evidence in the record from which a factfinder could determine that the plaintiff was himself negligent. The plaintiff was aware that Patterson was approaching him and would pass behind him. Carbonaro Dep. at 197. The captain of the vessel expressed the view that the plaintiff could have stepped closer to the starboard rail in order to permit Patterson to pass, particularly because the plaintiff was holding a sharp knife at the time. 30(b)(6) Deposition of Love's Fisheries, Inc. and Terry L. Hopkins, Exh. A to Defendant's Reply Memorandum (Docket No. 13), at 97, 99. This evidence, though certainly self-serving, is sufficient to preserve the issue of comparative negligence for the consideration by the factfinder.

VI. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for summary judgment

be **GRANTED** as to the claim of unseaworthiness, and that the cross-motions for summary judgment otherwise be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 9th day of October, 1997.

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David M. Cohen
United States Magistrate Judge